

NO. 83673-6

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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QUALCOMM INCORPORATED,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

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**RESPONDENT'S SUPPLEMENTAL BRIEF**

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## I. INTRODUCTION

This case turns on the question of whether Qualcomm's OmniTRACS service primarily provides customers with new information, or instead, primarily provides customers a means to transmit their own information. When a person sells a service that primarily allows customers to transmit information electronically, the sale is subject to retail sales tax as a "network telephone service." After studying the record in this case, the Court of Appeals concluded that Qualcomm's OmniTRACS service primarily provided customers a means to transmit information between their equipment and software and held that sales of Qualcomm's OmniTRACS service fell within the definition of "network telephone service" in RCW 82.04.065 (1998). *Qualcomm, Inc. v. Dep't of Revenue*, 151 Wn. App. 892, 906-07, 213 P.3d 948 (2009).

In its petition for review, Qualcomm asserts that the Court of Appeals erred by not considering information generated by the customer's equipment and software as part of the sale of the OmniTRACS service. Petition at 3. In essence, Qualcomm is asking this Court to hold that Qualcomm's customers paid a monthly service fee to acquire information generated by equipment and software that they already owned. However, nothing in the record suggests that Qualcomm's customers purchased the monthly OmniTRACS service to acquire information from Qualcomm. Rather, the record demonstrates that the primary reason customers purchased the OmniTRACS service was to transmit information between their own equipment and software.

Qualcomm argues that the information generated by all the separate components of the larger OmniTRACS Mobile Satellite Communication System, which are purchased separately, should be viewed as part of the sale of the OmniTRACS service. But this argument is contrary to the plain language of the statute, which imposes the retail sales tax on “each retail sale” and the case law, which applies the sales tax based on the nature of the product or service purchased in the transaction at issue.

Since Qualcomm’s customers purchased the equipment and the software in separate transactions, the information generated by those components is produced by the customers, not Qualcomm. There is no reason for Qualcomm customers to pay a monthly service fee to acquire information that is generated by their own equipment. Thus, there was no reason for the Court of Appeals to consider the information generated by the separate components as part of the sale of the monthly OmniTRACS service that provided the communications link between the equipment and software. Accordingly, this Court should affirm the Court of Appeals.

## **II. QUESTION PRESENTED**

Did the Court of Appeals correctly determine that Qualcomm’s sales of the monthly OmniTRACS service were subject to retail sales tax by looking at the primary function of the service sold in the transactions at issue?

### **III. STATEMENT OF THE CASE**

Qualcomm sells the OmniTRACS Mobile Communications System primarily to trucking companies. CP 29 (§ 2). This system allows trucking companies to send and receive text messages between their drivers and their dispatch centers and to receive position information and sensor data from the trucks. CP 241. The OmniTRACS Mobile Communications System contains hardware and software purchased by the customers as well as satellite communications and position data processing provided by Qualcomm. CP 241-42.

There are two main aspects of the OmniTRACS Mobile Communications System: (1) real-time data communication; and (2) automatic position reporting. CP 86. To acquire these capabilities, each customer purchases three separate products: (1) the Mobile Communications Terminal (MCT) located on the truck; (2) the OmniTRACS software (QTRACS) installed at the customer's dispatch center; and (3) the OmniTRACS service, the monthly satellite communications service that transmits the text and position messages from the terminals on the trucks to the software at the customer's dispatch center, and in some cases, processes the raw position information coming from the trucks. CP 184-85, 241-42.

The mobile communications terminal costs \$2,950 - \$4,000 per unit and is installed on the customer's trucks. CP 193, 242. The terminal allows drivers to exchange messages with the customer's dispatch center. CP 242. It also transmits information about a truck's location via satellite



to Qualcomm's network management facility, where it is forwarded to the customer's dispatch center. CP 242, 244. Qualcomm collects retail sales tax on its sales of the mobile communication terminals. CP 117.

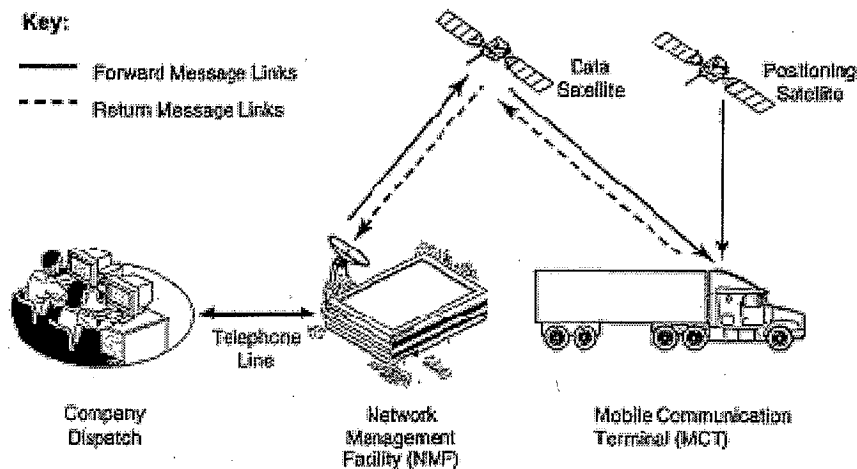
The QTRACS software costs \$15,000 per license and allows the customer's dispatcher to exchange messages with a mobile communications terminal on the truck, to request location information from the terminal, and to view the truck's location. CP 84, 110, 184, 241. Qualcomm collects retail sales tax on its sales of the software. CP 117.

The OmniTRACS service provides the satellite communications service needed to transmit signals from the terminal on the truck to the Qualcomm network management facility.<sup>1</sup> For customers using Qualcomm's proprietary location service, the OmniTRACS service also converts the positioning information transmitted by the terminal into latitude and longitude coordinates.<sup>2</sup> The following diagram, from Qualcomm's Mobile Communications Terminal Installation Guide, illustrates the data transmission paths:

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<sup>1</sup> Qualcomm sells the communications link between the customer's dispatch center and the network management facility separately. CP 188 ¶ 3.9.

<sup>2</sup> In this brief, the Department will use the term "positioning information" or "position" to refer to the raw position information and the term "location information" or "location" to refer to the "positioning information" that has been converted into latitude and longitude coordinates.



CP 243.

A customer can purchase one of two OmniTRACS service plans. The Basic Plan costs \$35 per truck per month and includes one automatic position poll per hour. CP 185. An automatic position poll transmits a truck's location from the mobile communications terminal to the network management facility and from there to the customer's dispatch center. CP 88, 185, 242. The Enhanced Plan costs \$50 per month and includes the Basic Plan plus 180 regular messages and 18,000 characters per month. CP 185. If a Basic Plan customer sends a regular message, the customer is charged \$0.05 per message plus \$0.002 per character.<sup>3</sup> CP 205, Appendix A-1. If an Enhanced Plan customer exceeds the monthly message allowance, incremental message charges are incurred at the same rates as Basic Plan customers. CP 185.<sup>4</sup>

<sup>3</sup> Customers can also send emergency, priority, and group messages, which are priced differently. CP 185.

<sup>4</sup> At the administrative level, Qualcomm represented to the Department that approximately 17% of its total charges were for incremental messaging. CP 119.

**A. Automatic Position Reporting**

A mobile communications terminal generates and transmits information about a truck's location using one of two methods - either Qualcomm's proprietary system, called the Qualcomm Automatic Satellite Position Reporting (QASPR) system, or the public Global Positioning System (GPS). CP 243. Customers purchase the same OmniTRACS service, regardless of whether they use the proprietary system or the GPS system. CP 246.

In Qualcomm's proprietary system, the mobile communications terminal measures the signals it receives from two Qualcomm satellites<sup>5</sup> and performs calculations on the signal measurements to generate the raw position data. CP 30 ¶ 3, 242. The terminal transmits this positioning information over Qualcomm's satellite communications system to the Qualcomm network management facility, where it is converted into latitude and longitude coordinates. CP 30 ¶ 3, 112, 242. The latitude and longitude coordinates are then forwarded to the customer's dispatch center for use in the QTRACS software. CP 88.

For the customers using the public GPS system, a GPS receiver and the terminal on the truck generates the latitude and longitude coordinates. These customers use the OmniTRACS service only to transmit the coordinates to their dispatch centers. CP 246.

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<sup>5</sup> Technically, Qualcomm leases transponder space on these satellites. CP 30 ¶ 3.

## **B. Mobile Messaging**

There are three types of messages transmitted via the OmniTRACS service: freeform, macro, and SensorTRACS. CP 30 ¶ 5. Freeform and macro messages allow drivers and dispatch centers to communicate with each other by sending messages such as pick-up and delivery confirmations. *Id.* Macro messages typically are fill-in-the-blank messages that the dispatchers create with the QTRACS software and send to the mobile communications terminals for their drivers to use. CP 30 ¶ 6. Freeform messages allow drivers or dispatchers to send text messages without pre-defined data fields or inputs. CP 30 ¶ 6-8.

Qualcomm also offers an optional SensorTRACS system that collects information from various sensors on the vehicle and transmits it to SensorTRACS software located at the customer's dispatch center. CP 198, Appendix A-2. The SensorTRACS hardware and software are sold separately. CP 184, 197. The SensorTRACS hardware is part of the terminal and gathers and processes speed, engine RPM, and other vehicle data from the vehicle's existing sensors. CP 198, Appendix A-2. It then transmits this information to the SensorTRACS software located at the customer's dispatch center using the OmniTRACS system. *Id.* The information is treated and billed the same as a regular message. CP 196.

## **C. Procedural History**

In 2002, the Department audited Qualcomm for the period 1998 through 2001. CP 117. As a result of the audit, the Department assessed Qualcomm for uncollected retail sales tax on its sales of the monthly

OmniTRACS service. CP 10. Because Qualcomm collected and remitted retail sales tax on its separate sales of equipment and software, those sales were not at issue. CP 117. Qualcomm paid the assessment and filed a de novo refund action under RCW 82.32.180. CP 5.

On cross-motions for summary judgment, the Superior Court granted the Department's motion and denied Qualcomm's motion, concluding there were no genuine issues of material fact and the Department was entitled to judgment as a matter of law. CP 304.

The Court of Appeals affirmed the Superior Court's order, holding that the primary purpose of the OmniTRACS service was to transmit customers' information, not to provide the customers with new information. *Qualcomm*, 151 Wn. App. at 906-07.

Qualcomm then filed a petition for review, arguing that the Court of Appeals failed to consider the capabilities of the separately purchased equipment and software when analyzing the primary reason Qualcomm's customers purchase the monthly OmniTRACS service. Petition at 4.

#### **IV. ARGUMENT**

Qualcomm argues the Court of Appeals erred in applying the "true object" test to the transactions at issue in this case by analyzing the functions of the monthly OmniTRACS service and not the entire OmniTRACS Mobile Communications System. Petition at 3. But Qualcomm's argument ignores the fact that the only transactions at issue were the sales of the OmniTRACS service, not the entire OmniTRACS

Mobile Communications System. *Qualcomm*, 151 Wn. App. at 895. The retail sales tax is imposed on each sale of a good or service. RCW 82.08.020. By choosing to sell the OmniTRACS service separately from the equipment and software, Qualcomm, not the Court of Appeals, isolated the functions of the OmniTRACS service for purposes of taxation.

Qualcomm asserts that the functions of the entire OmniTRACS Mobile Communications System, including the functions of the equipment and software, are the relevant object of the transactions at issue. Petition at 3. This is incorrect. Qualcomm's customers have already purchased the equipment and software. Thus, all they need to acquire is a communications service to link them together. To put it another way, if Qualcomm were to stop selling the monthly OmniTRACS service, customers would not need to purchase the entire system from a third party, only the capabilities provided by the OmniTRACS service. Because the OmniTRACS service primarily provides a communications link between the equipment on the truck with the software at the dispatch center, the Court of Appeals correctly determined the "true object" of the monthly service transactions at issue was to acquire "network telephone service."

**A. The Court Of Appeals Correctly Applied The "True Object" Test To The OmniTRACS Service Because The Equipment And Software Were Purchased Separately And Were Not Part Of The Transactions At Issue.**

Retail sales tax is imposed on each sale of a good or service. RCW 82.08.020; *see also Mahler v. Tremper*, 40 Wn.2d 405, 409-10, 243 P.2d 627 (1952) (a sales tax is imposed on the act or incidence of transfer);

*Black v. State*, 67 Wn.2d 97, 99, 406 P.2d 761 (1965) (sales tax imposed on the transaction). A “sale” is defined as any transfer of ownership, title or possession of property for valuable consideration or any activity classified as a “retail sale.” RCW 82.04.040. Accordingly, the taxability of a transaction is determined by the nature of the specific product or service being provided in exchange for compensation.

**1. The taxation of a product or service is determined on its own unless it is part of a bundled transaction.**

Sometimes different products or services can be part of the same sale. Where a company sells distinct products or services and the compensation for each product or service can be reasonably determined, the tax is applied to each product or service individually. *See Community Telecable of Seattle, Inc. v. City of Seattle*, 164 Wn.2d 35, 45, 186 P.3d 1032 (2008) (company offering telephone service still subject to telephone tax, even if it also sells non-taxable Internet services); *see also New England Tel. & Tel. Co. v. Clark*, 624 A.2d 298, 300-02 (R.I. 1993) (readily separable services are not taxed as part of sale of telecommunications equipment).

This is consistent with the Department’s longstanding position that separate and distinct products or services sold together will be taxed individually if there is a reasonable basis to determine the price of the individual products or services. *Compare Clark*, 624 A.2d at 300-02, with DOR Det. No. 89-433A, 11 WTD 313 (1992), Appendix B at 5. A reasonable basis to determine the price of the products will normally exist

when the products are separately stated on the bill or in a price list or schedule. *Id.*

In cases where there is really only one product or service provided or there is no reasonable basis to determine the individual prices of the products, then the courts look at the “true object,” i.e., the primary or predominant nature of the transaction to determine its taxability. *See Washington Printing & Binding Co. v. State*, 192 Wash. 448, 454, 73 P.2d 1326 (1937); *see also* DOR Det. No. 90-128, 9 WTD 280-1 at 5 (1990), Appendix C (where service incidental to sale of another service, the tax is applied based on the nature of the predominant service); *Clark*, 624 A.2d at 300-01. A classic example of the “true object” test is the fee paid to a lawyer for drafting a will. *Washington Printing*, 192 Wash. at 452-53. When a client approaches a lawyer to obtain a will, the client is seeking the attorney’s skills in drafting the language of the will, not the tangible pieces of paper on which the will is written. *Id.* To put it another way, the attorney is selling legal services, not paper. Thus, the “true object” of the transaction is the legal service provided by the lawyer, and the paper is merely an incidental aspect of the transaction. *Id.*

On the other hand, if the client were to purchase 500 reams of paper from OfficeMax and gave it to the attorney to use in a document intensive case, that sale would be subject to retail sales tax. In this situation, the client is paying OfficeMax to acquire ownership of the paper. *See* RCW 82.04.050 (“retail sale” includes “every sale of tangible personal property”); RCW 82.04.040 (“Sale” means “any transfer of the



ownership of, title to, or possession of property for a valuable consideration”). It does not matter that the client purchased the paper so that the attorney could use it in the course of representing the client. The transaction is taxable as a retail sale because the client provided valuable consideration in exchange for ownership of the paper.

In 2007, the Legislature codified many of these principles by adopting the Streamlined Sales and Use Tax Agreement.<sup>6</sup> Compare RCW 82.08.190 and .195 with DOR Det. No. 89-433A, 11 WTD 313 at 4-5, Appendix B, and *Clark*, 624 A.2d at 300-302. Like the rules established in DOR Det. No. 89-433A and *Clark*, RCW 82.08.190 and .195 do not apply when the products are purchased in two separate transactions or if there is a reasonable basis to determine the price paid for distinct and identifiable products. See RCW 82.08.190(1)(a)(ii) (bundled transaction involves sale of two products for “one nonitemized price”).<sup>7</sup>

Qualcomm’s arguments reflect its misunderstanding of the “true object” test. Qualcomm alleges that the “true object” test should be applied to the functions of the entire OmniTRACS Mobile Communications System. Petition at 17. However, the “true object” test

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<sup>6</sup> Qualcomm asserts the Court of Appeals’ decision jeopardizes Washington’s compliance with SSUTA. Petition at 13. As noted in the Answer to the Petition for Review, the decision is consistent with the SSUTA statutes and it is Qualcomm’s application of the “true object” test that would jeopardized Washington’s compliance. Answer at 15-16.

<sup>7</sup> “‘One nonitemized price’ does not include a price that is separately identified by product on binding sales or other supporting sales-related documentation made available to the customer in paper or electronic form including, but not limited to, an invoice, bill of sale, receipt, contract, service agreement, lease agreement, periodic notice of rates and services, rate card, or price list.” RCW 82.08.190(3).

only applies when there is a combined sale of taxable and non-taxable products or services. Most of the cases applying the “true object” test deal with sales of taxable tangible personal property combined with exempt services. *See, e.g., Washington Printing & Binding*, 192 Wash. at 454; *Clark*, 624 A.2d at 300-01. When there is a bundled transaction involving taxable tangible personal property and non-taxable services, the analysis focuses on whether the non-taxable services or the tangible personal property is the “true object” of the transaction. *Id.* Further, it makes little sense to apply the “true object” analysis to sales where both the service and the equipment, like the ones in this case, would be taxable if sold on their own. Logically, the transaction is subject to retail sales tax regardless of which product is the “true object” of the transaction.

**2. Because OmniTRACS service is sold on monthly basis the monthly charges constitute separate transactions from the discrete sales of the equipment and software.**

Unlike most “true object” cases, the OmniTRACS service is not sold as part of a bundled transaction that includes tangible personal property. Qualcomm sells equipment and software to customers separately from the monthly charges for the OmniTRACS service. Moreover, each of the monthly service charges for the OmniTRACS service are separate transactions for sales tax purposes. *See Gandy v. State*, 57 Wn.2d 690, 695, 359 P.2d 302 (1961). In *Gandy*, this Court held that sales tax applied to each lease payment made under a lease contract. *Gandy*, 57 Wn.2d at 695. The Court concluded that the lease contract

represented a series of transactions in which rental payments were made in exchange for continued possession of the leased property. *Id.*

Consequently, the Court held the monthly rental payments were subject to retail sales tax even though the parties executed the original lease contract prior to the imposition of retail sales tax on leases of tangible personal property. *Id.*

Since the OmniTRACS service was provided and billed on a monthly cycle, there was a series of transactions in which customers received the capabilities of the OmniTRACS service for a month in exchange for payment of the monthly service fees. CP 189 ¶ 6.1; CP 205. Here, “retail sale” was defined to include “providing... data, or similar communications or transmission for hire, via a ... microwave, or similar communication or transmission system.” Former RCW 82.04.050(5) (1998); former RCW 82.04.065(2) (1998). Under *Gandy*, each monthly payment of the OmniTRACS service fee qualified as its own “retail sale.” As such, the Court of Appeals correctly found that Qualcomm’s customers paid \$35 or \$50 per month to acquire the benefits of the basic or enhanced OmniTRACS service, not the benefits of the separately purchased equipment or software. *Qualcomm*, 151 Wn.App. at 907.

**B. The Information Generated By The Customer’s Equipment And Software Is Not Relevant Because Customers Are Not Paying Qualcomm To Acquire This Information When They Purchase The Monthly OmniTRACS Service.**

Qualcomm seems to urge the Court to take the unprecedented step of determining whether a particular transaction is subject to retail sales tax

based on the capabilities of products and services acquired in other transactions. Petition at 3. As explained above, nothing in the statute, the case law, or the administrative decisions supports this conclusion. When products and services are purchased separately, the taxation of those products and services is based solely on what the customer is purchasing in each particular transaction. “There is levied ... a tax on each retail sale.” RCW 82.08.020 (emphasis added). If the product or service transferred or provided in the transaction falls within the definition of a “retail sale,” then the sale is subject to retail sales tax. *Id.*

Here, the equipment and software were sold and transferred to the customer separately. Thus, retail sales tax was owed on the transfer of the title or possession of the equipment and software. RCW 82.04.040. The equipment and software sales were separate and distinct from the monthly charge for the OmniTRACS service, which the Court of Appeals correctly concluded was purchased primarily to provide data transmission over a satellite communications system. *Qualcomm*, 151 Wn. App. at 906-07. Therefore, the OmniTRACS service was a separate “retail sale” from the equipment and software.

Qualcomm asserts that all of the components must be purchased together in order for the OmniTRACS Mobile Communications System to function. Petition at 3. However, this is factually incorrect and largely irrelevant. First, customers are not required to purchase the QTRACS software in order to use the service or equipment. Customers can purchase or create their own software. See CP 109. Second, customers

can purchase or lease the equipment from third parties.<sup>8</sup> Accordingly, the equipment, the software, and the OminTRACS service do not need to be purchased together. Indeed, there may be situations where the only product purchased from Qualcomm is the OmniTRACS service. Thus, it makes little sense to say that the information generated by the equipment and software is part of the sale of the OmniTRACS service.

Moreover, whether the components have any functionality without the other portions of the system is irrelevant. The tax is imposed on “each retail sale,” and there is no statutory basis for determining whether a transaction is taxable by combining separate “retail sales.” In *Clark*, the Rhode Island Supreme Court found that the taxation of equipment and services sold together should be determined separately even though each would be useless without the other. *Clark*, 624 A.2d at 300-02.

Accordingly, it is irrelevant whether the purchased product will work without other products. The proper focus is on the nature of the product or service the customer receives in the particular transaction at issue.

The Court of Appeals correctly analyzed the nature of the service Qualcomm provided to customers in exchange for the monthly OmniTRACS service fees, not what customers received in separate transactions involving equipment and software.

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<sup>8</sup> See CP 187 ¶ 1.11 (“Customer shall have the right to remarket the Equipment to any independent contractor of Customer”); CP 189 ¶ 7.1 (“[T]he following shall constitute a material default and breach of this Agreement ... Any event which would constitute a material default or breach of any agreement between Customer and QUALCOMM, or with any third party for the lease of the Equipment”) (emphasis added).

**C. The Court Of Appeals' Decision Is Consistent With This Court's Decision In *Community Telecable* Because Both Decisions Properly Analyzed The Nature Of The Service At Issue As A Whole.**

Qualcomm argues that the *Community Telecable* decision supports its position. This is incorrect. Unlike the City of Seattle in *Community Telecable*, the Department and the Court of Appeals did not split sales of the OmniTRACS service into two different components and analyze them separately. Rather, Qualcomm sold the OmniTRACS service separately from the hardware and software components, thereby isolating the functions of the service for tax purposes. Therefore, the Court of Appeals properly concluded the tax applied based on the nature of the service Qualcomm sold to its customers, just as this Court in *Community Telecable* determined the nature of the service Comcast sold to its customers. *Community Telecable*, 164 Wn.2d at 44. Contrary to Qualcomm's position, the Court in *Community Telecable* did not hold that the taxability of a service changes based on separate and distinct sales of other services or products. *Id.*

Indeed, in *Community Telecable*, this Court distinguished the Department's Excise Tax Advisory, which states that sales of telephone service to an Internet service provider are taxable as "network telephone service" even if the provider uses the telephone service to provide Internet service. *Community Telecable*, 164 Wn.2d at 44 n.2; ETA 2029.04.245, Appendix D. In *Community Telecable*, the parties did not dispute that Comcast was selling Internet service to its customers, and that Internet

service was excluded from the definition of “telephone business.” *Id.* at 41-42. Seattle merely argued that Comcast’s agreement with the At Home Corporation, under which Comcast split the proceeds of its cable Internet service sales with At Home in exchange for backbone Internet connectivity, meant that Comcast was also providing “transmission to and from the site of an internet provider via a ...cable.” *Id.* at 39-40, 43-44.

In response to Seattle’s argument, this Court held that the city could not break up Comcast’s sale of cable Internet service into different components and tax the components separately. *Community Telecable*, 164 Wn.2d at 45 (“the transmission component of cable Internet service cannot be taxed separately from those very services.”). As noted above, this Court distinguished the situation in which a telephone company sells telephone service to an Internet service provider that in turn uses the telephone service to provide Internet service. *Id.* at 44 n.2. Those sales remain taxable as a telecommunications service because the telephone company is still selling telephone service to the Internet service provider, regardless of how the provider chooses to use the service.

Accordingly, *Community Telecable* did not hold that services sold separately must be analyzed together when determining their taxability. Therefore, the Court of Appeals’ analysis of the predominant aspect of the service Qualcomm sold in the sales at issue, and not the capabilities of products sold separately, is consistent with the Court’s decision in *Community Telecable*.

**D. Even If The Functions Of The Entire OmniTRACS Mobile Communications System Were Relevant, It Would Still Be Taxable As A “Network Telephone Service.”**

While the functions of the entire OmniTRACS Mobile Communications System are not relevant for the reasons discussed above, Qualcomm’s arguments that the primary function of the system is to generate information is not supported by the record. As its name suggests, the major value of the OmniTRACS Mobile Communications System is its ability to transmit the truck’s location and vehicle information back to the customer’s dispatch center in a timely manner, regardless of whether the truck is near a telephone or even in cell phone range. See CP 102 (“Using our nationwide two-way satellite link, you can rapidly locate your trucks anywhere and contact them anytime”). Trucks with GPS units know their position, but this information is of little use unless it is transmitted to the dispatch center. CP 254. Because GPS and non-GPS customers purchase the same service, this demonstrates that the satellite communications capability is the primary aspect of the system. CP 246.

Qualcomm’s brochure also states: “OmniTRACS is a two-way mobile satellite communications system that allows dispatchers and drivers to exchange text messages. It also provides vehicle location and performance data.” CP 240, Appendix E-1. Qualcomm goes on to declare: “With the OmniTRACS system, a company can maintain two-way contact with its vehicles and drivers 24 hours a day.” CP 241, Appendix E-2. These statements and other evidence in the record demonstrate that a major aspect of the OmniTRACS Mobile



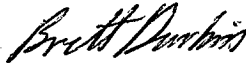
Communications System is its ability to send special text messages, which are easier to send and more useful than regular text messages, without relying on cell phone reception.<sup>9</sup> See *infra* p. 7; CP 102, 240-41. Without the ability to transmit the information from the trucks to the companies' dispatch centers in a timely and efficient manner, the information would have little value to the companies. See CP 241, Appendix E-2. Accordingly, the record shows that transmission of information is the primary function of the OmniTRACS Mobile Communications System, not acquiring information from Qualcomm. Accordingly, even if the tax were applied based on the "true object" of the OmniTRACS Mobile Communications System the sales at issue would still be subject to retail sales tax as sales of "network telephone service."

## V. CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of April, 2010.

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BRETT DURBIN  
Assistant Attorney General  
WSBA #35781

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<sup>9</sup> As noted in the Department's brief below, messaging charges are a significant portion of the OmniTRACS service charges and are clearly taxable. Resp. Br. at 22-23. So, even if the charges for the basic service were not taxable, the messaging charges are a consequential aspect of the OmniTRACS service and, therefore, the portion of the service charges attributable to messaging would be subject to sales tax. RCW 82.08.195(5)(a).



5775 MOREHOUSE DRIVE  
SAN DIEGO, CA 92121-1714  
(858) 651-6000 Fax (858) 587-8276

Customer No. 6288  
Invoice No. 93267628  
Invoice Date 06-SEP-2001  
Period Ending 31-AUG-2001  
Date Due 30-SEP-2001

### OmniTRACS BILLING SUMMARY

#### Base Charge Summary

<u>Billable Equipment</u>	<u>Rate</u>	<u>Total Charges</u>
48	\$35.00	\$1,680.00

#### OmniTRACS Activity Summary

	<u>Messaging Activity</u>			<u>Rate per</u>	<u>Rate per</u>
	<u>Total</u>	<u>Total</u>		<u>Message</u>	<u>Character</u>
	<u>Messages</u>	<u>Characters</u>			
Regular Forward Message	1,150	109,015		\$0.050	\$0.002 \$275.50
Regular Return Message	1,596	91,451		\$0.050	\$0.002 \$262.69
SensorTRACS Return Message	194	46,829		\$0.050	\$0.002 \$103.38
TOTAL ACTIVITY	2,940	247,295			\$641.57

#### Other Messages Summary

	<u>Messaging Activity</u>			<u>Rate per</u>	<u>Rate per</u>
	<u>Total</u>	<u>Total</u>		<u>Message</u>	<u>Character</u>
	<u>Messages</u>	<u>Characters</u>			
Group Message 26 - 50 MCTs	6	1,555	Sec Detail Breakout		\$44.10
Special Requested Position Poll	1	0		\$0.050	\$0.000 \$0.05
TOTAL ACTIVITY	7	1,555			\$44.15

#### OmniTRACS Billing Summary

MESSAGING COST (BASE CHARGES + INCREMENTAL CHARGES + OTHER MESSAGES CHARGES) \$2,365.72

## EXHIBIT "A"

### SENSORTRACS® SYSTEM

The SensorTRACS System is an optional product and service available on the OmniTRACS® System which provides summarized operating data such as vehicle and engine overspeed, and idle time accumulation. The SensorTRACS System consists of the SensorTRACS firmware contained in the Communication Unit of the MCT, or the ACU of the IMCT (the "SensorTRACS Feature") and the SensorTRACS application software (the "SensorTRACS Application Software") which resides on the Customer's dispatch computer to utilize forward and return messages over the OmniTRACS System for the transfer of data as more fully described below. Additions or changes to the functionality of the SensorTRACS Feature may be subject to additional license and enabling fees which Customer may, but shall not be required to obtain.

The speed, RPM, and/or other data inputs are obtained by monitoring existing vehicle sensors either directly or via a vehicle data link. The manner in which the data is captured is affected by a set of user specified parameters such as overspeed thresholds for both the vehicle and engine ("Parameters"). The data is captured in up to five (5) separate driver accounts. A default account is used whenever there is not a driver explicitly "logged on" to SensorTRACS, and the other four (4) accounts are opened based on "log on" of drivers using numeric identifiers entered at the IMCT keyboard/display. Identifying numbers used to log on are not validated by the IMCT. Certain of the summary statistics for each driver may be viewed on the IMCT display. Periodically the data accumulated in one or more driver account in the IMCT is transferred over the OmniTRACS System (an "Extract," with reset) to the dispatch computer, and the IMCT account is reset to zero.

SensorTRACS data may only be received at the dispatch computer by using the OmniTRACS System with SensorTRACS Application Software. Data transmission may be initiated automatically by the IMCT under certain conditions, or as the result of a request for an Extract from the dispatch computer using the OmniTRACS System. Requests for Extracts and changes to Parameters (referenced above) are sent to the vehicle using OmniTRACS forward messages. The driver extracts are obtained using OmniTRACS return messages.

06-10-97 vers.

Cite as Det. No. 89-433A, 11 WTD 313 (1992).

BEFORE THE DIRECTOR  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

[illegible]

[1] FIXED PRICE CONTRACT TO PERFORM VARIETY OF ACTIVITIES -- TAXATION OF. A fixed price contract to perform retailing, service, and government contracting activities treated as a contract to perform a variety of activities, each of which is taxable according to its corresponding B&O tax category, where the values assigned to the various activities were negotiated by the contracting parties prior to performance of the contract.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .  
. . .

DATE OF CONFERENCE: January 9, 1991

NATURE OF ACTION:

At issue is whether 100% of the income earned by the taxpayer under its contract with the military (Contract B) is taxable at the Service rate rather than at the rates applicable to the various activities performed pursuant to the contract.

FACTS AND ISSUES:

Roys, Sr. A.L.J. -- The taxpayer is a prime contractor for the United States [military]. At issue is the income from its contract for providing services at the . . . (Contract B). The taxpayer contends the Determination erred in concluding it received a fixed price for the contract which was paid regardless of performance and in concluding that the contract was overwhelming a service contract.

The taxpayer submitted an affidavit from its vice president of finance which explained the nature and structure of its contracts with . . . (contract A) and . . . . According to the taxpayer, "contract A" was one for operation of base morale services such as the Officer's Club and other recreational facilities. The taxpayer received a commission on its sales for those services.

The taxpayer explained "Contract B" as follows:

The contract at the . . . facility is one for operation and maintenance of the physical plant and assets at that facility. The contractor reviews the requirements for performance of the contract which are specified in the Annexes to the contract, and makes a fixed price bid for the performance of the activities specified. Assuming the contractor is otherwise qualified to perform the contract, the contract is awarded to the contractor making the lowest bid.

The contractor awarded the contract prepares a Schedule of Deductions, which assigns values to the activities described in the Annexes. The total of the values assigned to the activities equals the fixed price bid. The values assigned to the various activities are negotiated with [military] personnel, as these values form the basis for non-payment by the [military] in the event the contractor does not perform an activity.

Payment of an amount listed in the Schedule of Deductions is contingent upon performance of the activity. If [taxpayer] does not perform a particular activity, the value assigned to the activity in the Schedule of Deductions is not paid. The [military] has an extensive quality assurance program, and [taxpayer] is required to submit detailed reports, such that performance of the activities required under

the contract is closely monitored. In a few instances, [taxpayer] has not been paid amounts listed in the Schedule of Deductions, and thus, did not receive the entire fixed price for the fiscal year, as a result of claims by the [military] that certain activities were not performed by [taxpayer].

The taxpayer also provided portions of Contract B. Section B6 of the contract explained the Schedule of Deductions. The Schedule was to be prepared and submitted for approval within 15 calendar days after the date of the confirmation of the tentative award of the contract. No work was to begin until the Schedule of Deductions was approved.

The issue on appeal is whether Contract B should be treated as a contract to perform a variety of activities, each of which should be taxed under the corresponding B&O tax category, or as one for general services subject to Service B&O tax.

In the alternative, if the income from Contract B is to be taxed under the same B&O tax category, the taxpayer argued it should not be the service category. According to the taxpayer's calculations, less than 50% of the income from the activities is classified as a service activity. For example, for 1987, the percent of the total contract price was allocated as follows:

Service taxable -----	41.9383%
Government contracting --	26.5728
Retail - -----	16.4251
Warehousing-----	15.0638

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total	100%
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#### DISCUSSION:

The taxpayer relies on RCW 82.04.220 through 290, 82.04.440; Fidelity Title Co. v. Department of Rev., 49 Wn.App.662 (1987); ETB 49.04.171; Pan Am World Airways, Inc. v. State, (Thurston Cty. Superior Ct. No. 82-2-00358-9 1983); and WAC 458-20-224 (Rule 224) for its position that income should be taxed according to the type of activity performed. We agree that those authorities and others support the general proposition that a given business may involve more than one classifiable activity.

Clearly the Department recognizes that proposition. Assessments of businesses routinely include more than one B&O tax classification. For example, a business might perform accounting functions for affiliates, make retail sales, print forms for internal use, etc. and it would be subject to the applicable B&O tax on those activities. See, e.g., Group Health Cooperative of Puget Sound v. Department of Rev., 106 Wn.2d 391 (1986) (B&O tax upheld on Group Health's carpentry and print activities). Also, a personal service business would be subject to retailing B&O and retail sales tax on any income received from sales of tangible personal property apart from the rendition of personal services. WAC 458-20-148.

We also agree with the taxpayer that the fact it was required to submit a fixed price bid for performing all of the activities should not require all of the income for the contract to be subject to the same tax classification. The Department has allowed taxpayers to report income from lump sum contracts under more than one tax classification. ETB 49.04.171 summarizes a 1966 decision by the former Washington Tax Commission. At issue was whether the construction of publicly owned roads as part of a construction contract for a large housing project was taxable as a retail sale where the contract or contractor's records only showed a lump sum

amount. The Commission held that the taxpayer's records only needed to prove that such work was performed and that the value as reported was reasonable to be taxable under "Public Road Construction" rather than "Retailing."

If a person sold a going business, the total price might be allocated between the real property, personal property, and goodwill. Assuming the allocated amounts were reasonable, the Department would assess real estate excise tax on the value of the real property transferred and retail sales or use tax on the value of the personal property sold. Similarly, we believe that some contracts to perform various business activities could be bifurcated between the various activities to be performed.

We do believe that bifurcation of a contract for taxation will be the unusual case. In most cases income from a performance contract will be taxed according to the primary nature of the activity. For example, income from processing for hire is taxed at the processing for hire rate even though some storage or other services are also involved. Rule 136, subsection 11, states that persons processing for hire are taxable under the processing for hire classification "upon the total charges made

therefor." The total charges could include unloading and loading which would be subject to tax at the stevedoring rate if they had been separate charges and not in conjunction with any processing activities.

In the present case, however, we agree Contract "B" should be treated as a contract to perform a variety of activities, each of which should be taxed under the corresponding B&O tax category. In reaching this conclusion we have relied on the fact that the contract required the taxpayer to perform a variety of different business activities with different B&O tax classifications and the Schedule of Deductions provides a reasonable basis for determining the value of the various activities performed. The Schedule of Deductions was required by the contract and was negotiated with the [military] before the work was performed and the values form the basis for non-payment in the event the taxpayer does not perform an activity.

Clearly, if the [military] had contracted with different businesses to perform the different activities, the Department would tax the amounts according to the nature of the activity performed. For example, if the [military] had hired one business to do its data entry services and another to do maintenance and repairs, the income from each contract would be taxed differently. We believe the result should be the same with a fixed price contract to perform a variety of activities where values are assigned to the various activities to be performed by the parties to the contract and the assigned values are reasonable.

#### DECISION AND DISPOSITION:

The taxpayer's petition is granted. The matter will be remanded back to the Audit Division for a revised assessment. Unless Audit has evidence that the Schedule of Deductions was not a reasonable allocation of the lump-sum amount, those amounts shall provide a basis for classifying the income for B&O tax purposes.

DATED this 4th day of December 1991.



Cite as 9 WTD 280-1

BEFORE THE INTERPRETATION AND APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition	)	<u>D E T E R M I N A T I O</u>
<u>N</u>		
For Correction of Assessment of	)	
	)	No. 90-128
	)	
. . .	)	Registration No. . . .
	)	. . . /Audit No. . . .
	)	

[1] **RULES 138, 155, 245 and RCW 82.04.065:** INFORMATION AND COMPUTER SERVICES -- FURNISHING TELEPHONE LINES FOR DATA TRANSMISSION -- SERVICE B&O TAX. Charges to customers for "dedicated" telephone lines furnished by taxpayers for use in connection with on-line data processing services rendered by taxpayer are subject to Service B&O tax. Providing telephone lines is incidental to service activity and is not "network telephone service" as defined by RCW 82.04.065 and Rule 245.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

DATE OF TELEPHONE CONFERENCE: . . .

NATURE OF ACTION:

Taxpayer seeks a correction of assessment from an audit determination that taxpayer's furnishing dedicated telephone lines to its customers in connection with data processing services falls within the B&O Service classification.

## FACTS AND ISSUES:

Heller, A.L.J. (successor to Potegal, A.L.J) -- The taxpayer is engaged in the business of providing data processing services . . . . The taxpayer is the owner of computer software and hardware which it makes available to its customers for use in connection with the performance of its services. The taxpayer furnishes the customer with a telephone modem device which allows the customer to have on-line access to a central processing unit located on the taxpayer's premises. The transmission of data between the taxpayer and its customers occurs over "dedicated" telephone lines which the taxpayer purchases from the telephone company.

The agreement between the taxpayer and its customers provides that the customer is to bear the expense (as assessed by the taxpayer) of all terminal devices, maintenance, telephone lines and modems. In accordance with this arrangement, the taxpayer separately bills the customer for the cost of the telephone lines. The taxpayer refers to this income as "Network Charges". Believing that the furnishing of the telephone lines constitutes a retail sale under Washington law, the taxpayer also collects retail sales tax from the customer which it remits to the Department of Revenue ("Department"). The taxpayer reports its income from data processing services under the Service classification of the business and occupations tax. However, the taxpayer reports its Network Charges as taxable under the Retailing classification as a "telephone service."

An audit of the taxpayer conducted for the period beginning . . . and ending . . . resulted in a reclassification of taxpayer's Network Charges from Retail to the Service classification. This reclassification resulted in an assessment in the amount of \$ . . . plus accumulated interest.<sup>1</sup> The taxpayer appeals this assessment.

## TAXPAYER'S EXCEPTIONS:

---

<sup>1</sup>The taxpayer was assessed \$ . . . as the amount of Service B&O tax on Network Charges. This amount was offset by a credit of \$ . . . resulting from Retailing B&O tax reported in error for a total tax due of \$ . . . .

The taxpayer argues that providing dedicated telephone lines to its customers constitutes the furnishing of "network telephone service" as that term is defined in RCW 82.04.065 and WAC 458-20-245. According to the taxpayer, it purchases eight dedicated lines from . . . and in turn leases the lines for a flat fee to customers in fifty locations. The taxpayer asserts that this "network telephone service" is a separate product from the furnishing of computer services which is not used by all of its customers. Because those customers using the "product" are the consumers of the telephone service, the taxpayer concludes that the fees charged for the service is retailing income and taxable as such.

#### DISCUSSION:

WAC 458-20-155 ("Rule 155") is the duly adopted administrative regulation which governs the taxation of information and computer services. Rule 155 provides in pertinent part:

Persons rendering information or computer services and persons who manufacture, develop, process, or sell information or computer programs are subject to business and occupation taxes and retail sales or use taxes as explained in this rule.

. . . .

The term "information services" means every business activity, process, or function by which a person transfers, transmits, or conveys data, facts, knowledge, procedures, and the like to any user of such information through any tangible or intangible medium. The term does not include transfers of tangible personal property such as computer hardware or standard prewritten software programs. Neither does the term include telephone service defined under RCW 82.04.065 and WAC 458-20-245.

The term "computer services" means every method of providing information services through the use of computer hardware and/or software. (Emphasis supplied.)

It is this exception from the coverage of Rule 155 relating to telephone service which the taxpayer argues is applicable here.

In order for the furnishing of telephone lines to be taxable under the retailing classification of the business and occupations tax, the taxpayer must be making retail sales. RCW 82.04.250. A sale at retail means every sale of tangible personal property to consumers and includes "the providing of telephone service, as defined in RCW 82.04.065. . . ." RCW 82.04.050(5).

RCW 82.04.065 defines telephone service as either "competitive telephone service" or "network telephone service." The taxpayer claims that the furnishing of dedicated lines to its customers is network telephone service. According to RCW 82.04.065, network telephone service includes:

the providing by any person of access to a local telephone network, local telephone network switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, or similar communication or transmission for hire, via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system.

WAC 458-20-245 includes a similar definition. The taxpayer is apparently relying upon the reference to "the providing of . . . data, or similar communication or transmission for hire" to support its position.

[1] In carving out an exception for telephone service from the definition of information services, the Department has drawn a distinction between those persons who are engaged in the business of furnishing a particular medium over which data is transmitted and those furnishing the data or information services being transmitted. Those engaged in the business of providing the means by which data is communicated are treated as making a sale, while those furnishing the data or processing it are providing a personal service.

As in the present case, the line is not always clear as to whether a transaction is a sale or a service. The examination must focus upon the real object of the transaction sought by the taxpayer's customers and not just its component parts. Rule 155 addresses this issue by providing in part:

Liability for sales tax or use tax depends upon whether the subject of the sale is a product or a service. If information services, computer services or data processing services are performed, such that the only tangible personal property in the transaction is the paper or medium on which the information is printed or carried, the activity constitutes the rendering of professional services, similar to those rendered by a public accountant, architect, lawyer, etc., and the retail sales tax or use tax is not applicable to such charges. (Emphasis supplied.)

Here, it is clear that the furnishing of the telephone lines is not the object of the transaction, but merely incidental to the personal services being rendered. The representative form of agreement used by the taxpayer which was submitted in support of the petition is instructive in this regard. The agreement repeatedly refers to "services" or "data processing services" in describing the taxpayer's obligations to the customer. Several pages of the agreement are devoted exclusively to a detailed description of the types of data processing services to be rendered and the manner in which these services are to be performed. The only reference to the telephone lines is contained in the provision dealing with the customer's obligation to bear the cost of the same in connection with the "on-line availability" of the data processing services.

WAC 458-20-138 ("Rule 138") is the administrative regulation which defines personal services. Rule 138 has this to say about costs incidental to the rendering of personal services:

There must be included within gross amounts reported for tax all fees for services rendered and all charges recovered for expenses incurred in connection therewith, such as transportation costs, hotel, restaurant, telephone and telegraph charges, etc. (Emphasis supplied.)

We cannot accept the taxpayer's argument that because less than all customers contract for on-line services, the telephone lines are a separately furnished product. This argument misses the point. The relevant inquiry is whether the transactions which include the Network Charge are sales or

services. The fact that certain customers choose not to contract for on-line service has no bearing on this issue. By focusing on the real objective sought by the taxpayer's customers, we have concluded that the taxpayer's Network Charges should be taxed under the Service classification. For purposes of the retail sales tax, the taxpayer is the consumer of the telephone service and as such is obligated to pay the tax on its purchases. Since the taxpayer has previously collected retail sales tax on the fees charged for telephone service, it is entitled to a credit to the extent these taxes have been refunded to customers.

DECISION AND DISPOSITION:

Taxpayer's petition is denied.

DATED the 27th day of March 1990.



# Excise Tax Advisory

Excise Tax Advisories (ETAs) are interpretive statements issued by the Department of Revenue under authority of RCW 34.05.230. ETAs explain the Department's policy regarding how tax law applies to a specific issue or specific set of facts. They are advisory for taxpayers; however, the Department is bound by these advisories until superseded by Court action, Legislative action, rule adoption, or an amendment to or cancellation of the ETA.

Number: 2029.04.245

Issue Date: February 24, 2006

## Taxation of network telephone service used to provide Internet access services

On December 3, 2004, President Bush signed the Internet Tax Nondiscrimination Act of 2004, P.L. 108-435. This legislation reinstated and extended the moratorium on taxes on Internet access by amending the Internet Tax Freedom Act (ITFA). The legislation expanded the definition of tax-exempt Internet access by including telecommunications services that are purchased, used, or sold by an Internet service provider (ISP) to provide Internet access to its customers. This expanded definition of Internet access is thought by some taxpayers to include the type of services provided by network telephone service businesses to ISPs and their customers. This includes services used to connect an ISP to the Internet backbone or to ISP customer locations, such as the provision of transmission capacity over dial-up connections, coaxial cables, fiber optic cables, T-1 lines, frame relay service, digital subscriber lines (DSL), wireless technologies, or other means.

Washington has traditionally taxed the sale of these network telephone services to a consumer under the retailing classification of the business and occupation (B&O) tax and required the seller to collect retail sales tax. In 1997, RCW 82.04.065 was amended to explicitly include "the provision of transmission to and from the site of an internet provider via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system" as taxable network telephone service. To the extent that these services are included within the federal definition of "Internet access" (see below), ITFA appears to preempt the State's authority to apply B&O and retail sales taxes to the purchase of network telephone service used to provide Internet access, as well as the ISP's provision of traditional Internet access itself.

However, P.L. 108-435 also included two relevant grandfather clauses in section 3 of the Act. The first clause (subsection (a)(1)) grandfathers a state's right to continue assessing taxes on Internet access that were imposed and actually enforced as of October 1, 1998 if the tax was authorized by statute and the State had issued a public proclamation that such taxes were being imposed **or** the state generally collected tax on Internet access. This right continues through November 1, 2007, the date the moratorium is scheduled to end. P.L. 108-435 also included a second grandfather clause (subsection (b)) that applies to taxes imposed and enforced as of November 1, 2003. It grandfathers a state's right to continue imposing such taxes if the state had issued a public proclamation that taxes on Internet access were being imposed **and** the state generally collected such taxes. The right to continue imposing taxes under the second grandfather clause expires November 1, 2005. The language in the two grandfather clauses is substantively identical except for the different time periods (the first applies to pre-October 1998 taxes and the second applies to pre-November 2003 taxes) and the fact that the two provisos are written in the disjunctive for the first clause and in the conjunctive in the second clause.

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Some taxpayers believe that the second grandfather clause applies – to the exclusion of the first grandfather clause – to all taxes imposed on network telephone service used to provide Internet access services. These taxpayers point to statements made in the Congressional record that suggest that members of Congress thought that all state taxation of DSL services used to provide Internet access would cease as of November 1, 2005. Therefore, these taxpayers believe that they no longer need to collect and remit retail sales tax on sales of network telephone service used for Internet access after November 1, 2005.

The actual statutory language of ITFA does not, however, support this interpretation of the law. The first grandfather clause, effective until November 1, 2007, applies to any "tax on Internet access that was generally imposed and actually enforced prior to October 1, 1998." The term "Internet access service" is defined to include "telecommunications services . . . purchased, used, or sold by a provider of Internet access to provide Internet access." To the extent this modified definition includes purchased telecommunications used to provide Internet access, the first grandfather clause clearly applies to allow Washington State's taxation of these telecommunications services used to provide Internet access, because these taxes were imposed and enforced before October 1998. There is no indication in the statutory language that Congress intended the separate clauses to apply to different types of services, as opposed to covering taxes imposed in different time periods -- the language describing the applicable service is identical in both clauses. The applicable rule of statutory interpretation is that if the statutory language is unambiguous, a court will not consider the legislative history of the statute to reach a contrary conclusion. *Whitfield v. U.S.*, 543 U.S. 209, 215 (2005). Even if a court were to look to the legislative history of the act, however, the record is far from definitive and contains statements that could be seen to support either reading of the statute.

Finally, Washington meets the technical requirements of the first grandfather clause. In Washington, B&O and retail sales taxes on the sale of network telephone service used to provide Internet access were generally imposed and actually enforced prior to October 1, 1998. Taxpayers also had a reasonable opportunity to know of this practice due to the fact that RCW 82.04.065 explicitly stated that "the provision of transmission to and from the site of an internet provider via a local telephone network . . . or similar communication or transmission system" was taxable as network telephone service. Finally, the State generally collected B&O and retail sales taxes on the purchase of such network telephone service.

For these reasons, Washington's taxation of network telephone service used to provide Internet access qualifies under the first grandfather clause of ITFA and will continue as described above until at least November 1, 2007. This conclusion makes it unnecessary for the department to adopt a position with respect to the interpretation of the term "Internet access" advanced in the January 2006 Government Accountability Office report "Internet Access Tax Moratorium: Revenue Impacts Will Vary by State." The department may, before the expiration of the grandfather period, consider whether the amended definition allows the continued taxation of telecommunications services used to provide Internet access services, but does not do so at this time.

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## ***How the OmniTRACS® System Works***

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### ***OmniTRACS System Overview***

This chapter provides a basic overview of the OmniTRACS® mobile communications system and how its various components interact to send and receive messages.

The OmniTRACS system is a two-way, mobile satellite communications system that allows dispatchers and drivers to exchange text messages. It also provides vehicle location and performance data.

Topics in this chapter include:

<i>Why the OmniTRACS System Makes Companies More Efficient</i> .....	1-2
<i>OmniTRACS System Component Description</i> .....	1-2
<i>What is the QASPR System?</i> .....	1-3
<i>What Is the GPS System?</i> .....	1-4
<i>How the OmniTRACS System Uses GPS</i> .....	1-4
<i>What is the MCT?</i> .....	1-5

If you have technical questions while reviewing this chapter, please contact QUALCOMM Wireless Business Solutions® (QWBS) Customer Support. QWBS Customer Support is staffed 24 hours a day, 365 days a year:

In the United States, call 800-541-7490

In Canada, call 800-863-9191

In Europe, call 0800-333-11-333

## Why the OmniTRACS System Makes Companies More Efficient

With the OmniTRACS system, a company can maintain two-way contact with its vehicles and drivers 24 hours a day. The following are just a few of the advantages:

- The dispatcher can send pickup and delivery information directly to the drivers, keeping the vehicles on the road.
- The dispatcher knows when each vehicle is expected to arrive at its location, and can pass that information on to the customer.
- The system provides the dispatcher with vehicle location and position history information by tracking the location of each mobile communications terminal (MCT) using the latitude and longitude or distance and direction from landmarks (usually large towns and cities).
- Drivers can inform the dispatcher of road conditions or problems they may be experiencing.
- Various optional devices allow the monitoring of driver performance, engine diagnostics, trailer locations, and refrigeration status.
- Various decision support software enables customers to optimize assets and inform shipper and consignees on the status of their loads.

## OmniTRACS System Component Description

The OmniTRACS system consists of these major components:

Component	Description
Network Management Facility (NMF)	This facility is responsible for processing and managing the message traffic between the dispatch center and the fleet. Within the NMF is the Network Management Computer (NMC), which actually receives and handles the message traffic. The NMF is located at QUALCOMM, Inc., in San Diego, CA.
QUALCOMM Dispatch Software (QTRACS)	This is the software on the trucking company's dispatcher computer. This is the dispatcher's interface with the OmniTRACS system. It allows the dispatcher to send and receive messages, request MCT location information, and perform other dispatcher functions. QTRACS/400 and QTRACS/Windows customers communicate with the NMC via dialup using PPTP or a frame relay connection. QTRACS/Web customers communicate via the NMC using RI/Web client over a PPTP connection.
Data Satellite (uses Ku-band signals)	This satellite handles all two-way message traffic between the vehicle and the NMC. Located approximately 22,300 miles over the equator at 103° west longitude (south of Texas).

NO. 83673-6

**SUPREME COURT  
STATE OF WASHINGTON**

QUALCOMM INCORPORATED,

Petitioner,

v.

STATE OF WASHINGTON  
DEPARTMENT OF REVENUE,

Respondent.

CERTIFICATE OF  
SERVICE

I certify that I served a copy of Respondent's Supplemental Brief and this Certificate of Service, via U.S. Mail, postage prepaid, through Consolidated Mail Services, and electronically by email, on the following:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of April, 2010, at Olympia, WA.

  
CANDY ZILINSKAS, Legal Assistant

**ORIGINAL**